

file

**BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals**

Application of Green Lake Venture, Inc. for a
Permit to Construct a Pier on the Bed of Green
Lake, City of Green Lake, Green Lake County,
Wisconsin

Case No. 3-SD-96-2046

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Pursuant to due notice, including publication, hearing was held on April 9, 1997
at Green Lake, Wisconsin before Jeffrey D. Boldt, administrative law judge (the ALJ).

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this
proceeding are certified as follows:

Green Lake Association, by

James Muller, Attorney
302 Lac Verde Circle
Green Lake, WI 54941

Dennis Wilson, President
W1680 Sandstone Road
Ripon, WI 54971

Green Lake Preservation Society, by

Chester B. Possin
W3215 Orchard Avenue
Green Lake, WI 54941

Wisconsin Department of Natural Resources, by

Michael Cain, Attorney
P. O. Box 7921
Madison, WI 53707-7921

Green Lake Venture, by

Richard Lewandowski, Attorney
DeWitt, Ross & Stevens
2 East Mifflin Street, Suite 600
Madison, WI 53703

Mike Fuller
W1225 Illinois Avenue
Green Lake, WI 54941

Wyndham Gary
W3188 County K
Markesan, WI 53946

Marion R. Kuster
W1181 Illinois Avenue
Green Lake, WI 54941

Joan Irvine
477 Green Way
Green Lake, WI 54941

Lambert H. Newmann
485 East Bay Court
Green Lake, WI 54941

Leo Duwe
W2742 Oakwood Beach Road
Markesan, WI 53946

Marian Possin
W3125 Orchard Avenue
Green Lake, WI 54941

Fleetwood Miller
400 Strauss Avenue
Green Lake, WI 54941

Ted Olshansky
W1187 Illinois Avenue
Green Lake, WI 54941

Dr. Michael M. Orth
N4397 Nelson Road
Princeton, WI 54968

Joseph Dreyler
465 East Bay Court
Green Lake, WI 54941

FINDINGS OF FACT

1. Green Lake Venture, Inc. (GLV or the applicants), 150 East Gilman Street, Suite 1600, Madison, Wisconsin, 53703, completed filing an application with the Department of Natural Resources (the Department) for a permit under sec. 30.12, Stats., to place a pier on the bed of Big Green Lake, City of Green Lake, Green Lake County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicants own real property located on Government Lot 2 in Section 21, Township 16 North, Range 13 East, Green Lake County. The above-described property abuts Green Lake a.k.a. Big Green Lake which is navigable in fact at the project site.

3. The same applicant applied previously for a permit to construct two pitch-fork shaped piers 124 feet long and 80 foot wide, accommodating a total of 28 boats. After a three day contested case hearing held August 8-10, 1995, the Division ALJ denied the permit request by Order dated October 19, 1995. The new application is for a much more modest project: one pier structure, instead of two, accommodating 14 boats.

4. The applicants propose to construct the 14 slip pier adjacent to its property at 413 Strauss Avenue, Green Lake, Wisconsin. The parcel is contiguous to Green Lake and the applicants own 297 feet of riparian frontage. The applicants hope to construct a 8 unit apartment complex on the property and to make 8 slips available to residents of these units if construction is approved. The proposed plan would make available some of these units to the public as seasonal rentals.

5. The site currently includes a small tar-paper cottage and several small sheds on the upland above the riparian frontage. The applicants intend to demolish these upland structures if they build the eight-unit apartment complex. There is limited public usage of the waters near the proposed project site. The silty, mucky bottom and shallow waters discourage boating and swimming in the area. The public does make use of the area for fishing, especially for bluegill and large mouth bass. The shoreline around the proposed project site is highly-developed and includes numerous multi-slip piers. There is little remaining natural vegetation along the shoreline. The lot has some mature ash

trees and a grass lawn. However, from the water the subject property offers a small patch of green aquatic vegetation and water lilies against this highly-developed background.

6. The proposed project site represents one of the last remaining natural areas in Dartford Bay. The project site is home to a large stand of emergent, submergent and floating leaf aquatic plants. Floating leaf species include an attractive stand of white water lilies. Emergent species include bulrush, cattail, giant burreed and sagittarian. Submergent plants include coontail, curlyleaf pondweed, and buttercup. This area supports a diverse and abundant plant community that is no longer common in developed areas of Green Lake such as Dartford Bay. The diverse and abundant plant community in turn provides support and cover for various fish species including large mouth bass and bluegill. The sandy substrate in the area of the proposed pier is suitable for spawning for various centrarchids (sunfish family) species, including bluegill. Scattered patches of macrophytes and tree stumps at the site provide excellent cover and spawning habitat. The project site is one of the few remaining spawning areas for panfish and large mouth bass in the Dartford Bay area. Further, this area is one of the last in Dartford Bay to provide recreational fishing in the shallow littoral area of the bay.

7. The new application was designed with input from the local DNR staff to minimize impacts on the aquatic plant community. The pier will extend into the bay beyond the floating plant community. It must be remembered that the applicant could build a smaller pier that would be far more damaging to the plants in the area without the necessity of a hearing or permit. Instead, the new proposal makes every effort to preserve the integrity of the plant community. This is accomplished by extending the pier into the lake beyond the edge of the floating leaf community. No boats are to be moored within the environmentally sensitive area inside the "T" shaped structure. Further, the side finger slips are placed at an angle to minimize direct prop wash from boats at the plant community.

8. The project area provides wildlife habitat for numerous waterfowl, including mallards, wood ducks and canvas backs. There are also numerous herptiles including American toads, various frogs and painted turtles. The proposed project site will not have a detrimental impact on the public interest in maintaining habitat for terrestrial wildlife and furbearers. There is intensive development along the shoreline and a dearth of terrestrial vegetative cover along the water. The plant growth and fish habitat in the area do make it an important area for migratory waterfowl, especially during migration periods. However, taken as a whole, the record on this issue would not warrant denial of the permit application on the basis of impacts to wildlife.

9. The proposed structures will not materially obstruct existing navigation on Big Green Lake and will not be detrimental to the public interest upon compliance with the conditions of this permit. The piers would be placed in an area of Dartford Bay which is outside the usual navigational pattern on Green Lake. The predominant pattern of navigation in Dartford Bay is to the designated navigation channel some distance from

the project site, and from there out of the Bay into the open waters of Big Green Lake. Water-depths are shallow in the area of the proposed project, further discouraging boat traffic. The applicants demonstrated that the three foot water depth contour occurs approximately 110 from shore at the site. No pierhead line has been established in this area of Dartford Bay.

10. The Department of Natural Resources has formulated a non-binding guidance document which attempts to incorporate case law and to provide a threshold for field staff making "reasonable use" determinations. (The 1991 Guidance; Exhibit 17) The DNR has consistently used the 1991 Guidance as an analytical tool to approach difficult issues relating to the "reasonable use" of riparian parcels and the balancing of private and public rights under the public trust doctrine. Many members of the public testified that they believed the pier guidances should be strictly applied to allow a total of seven slips at this site. However, the pier guidance is to be used as a threshold number to guide local DNR field staff in assessing an individual proposal. The instant proposal was designed with significant input from local DNR field staff. All Department witnesses testified that there would be minimal environmental impacts from placement of the pier, given its design. Andy Nelson, DNR Area Water Management Specialist, however, opined that he believed 14 slips was at the extreme limits of a reasonable use of the project site. Nelson indicated that some boat traffic would be at the margin of existing plant communities with the 14 slip configuration. To further assure the proper balance between the public interest in maintaining fish spawning areas, a condition has been added to eliminate the two boat slips closest to shore. The total number of boats moored at the site shall not exceed 12.

Further, on its face the guidance allows for more than the threshold number (7 in this case) for "marinas or other similar facilities" that make slips available to non-riparian members of the public. (Exhibit 17, p. 4) The pier represents a marina if any slips over the threshold number of 7 are made available to the public on a daily, weekly or seasonal basis. The Department has not bent its rules to accommodate Green Lake Venture and the Heidl House, as some public comments suggested. Rather, the Department properly opposed the last massive project which threatened an environmentally sensitive spawning area. The instant permit application reasonably applies the flexibility which is an essential component of its riparian moorings guidance. If the project is constructed in accordance with the attached permit conditions, the project will not be detrimental to the public interest in navigable waters and will constitute a "reasonable use" of the riparian property.

11. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

12. The proposed structures will not reduce the effective flood flow capacity of Big Green Lake upon compliance with the conditions in the permit.

13. The proposed structures will not adversely affect water quality nor will they increase water pollution in Big Green Lake. The structure will not cause environmental pollution as defined in sec. 144.01(3), Stats., if the structures are built and maintained in accordance with this permit.

14. All of the following conditions are reasonable and necessary to assure that there are no detrimental impacts to the public interest in navigable waters.

15. The Department has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact. An environmental assessment was conducted regarding this project and others in Dartford Bay prior to the 1995 hearing.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.

2. The applicants are riparian owners within the meaning of sec. 30.12, Stats.

3. The proposed facilities described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.

4. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment. The DNR prepared an Environmental Assessment (EA) in connection with this and related pier applications on Green Lake. The EA concluded that the project was not a major state action significantly affecting the quality of the human environment and that no EIS was required. There is no right to a contested case hearing on the issue of whether or not the Department should have prepared an Environmental Impact Statement. North Lake Management District v. DNR, 182 Wis. 2d 500, 513 N.W.2d to 3 (Wis. Ct. App. 1994) (cert den. 7/19/94)

5. The applicant for a Chapter 30, Stats., permit has the burden of proof that the project will meet the standards in sec. 30.12(2), Stats., Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicant has carried its burden of showing that the proposed project would not be detrimental to the public interest in navigable waters.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, a permit under sec. 30.12, Stats., for the construction of structures as described in the foregoing Findings of Fact, subject, however, to the conditions that:


1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or become detrimental to the public interest.
2. The permittees shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
3. A copy of this permit shall be kept at the site at all times during the construction of the structures.
4. The permit granted herein shall expire three years from the date of this decision, if the structures are not completed before then.
5. The permittees shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
6. The permittees shall notify the Area Water Management Specialist Andy Nelson, not less than 5 working days before starting construction and again not more than 5 days after the project has been completed.
7. Any area disturbed during construction shall be seeded and mulched or rippedraped as appropriate to prevent erosion and siltation.
8. No heavy equipment shall be operated in the lake at any time unless written notification is made to the Area Water Management Specialist, Andy Nelson, at least 5 working days in advance.
9. Placement of the pier structure shall be in the configuration shown in Attachment "A." No boats shall be moored at slips #4 and 14. The total number of boats moored at the pier shall not exceed 12 at any time. A total of five slips shall be made available to the public for rental on a daily, weekly or seasonal basis.
10. The applicant shall place signs requesting that no boats moored at the pier operate within the 80 foot buffer zone reflected on Attachment "A."
11. Acceptance of this permit shall be deemed acceptance of all conditions herein.

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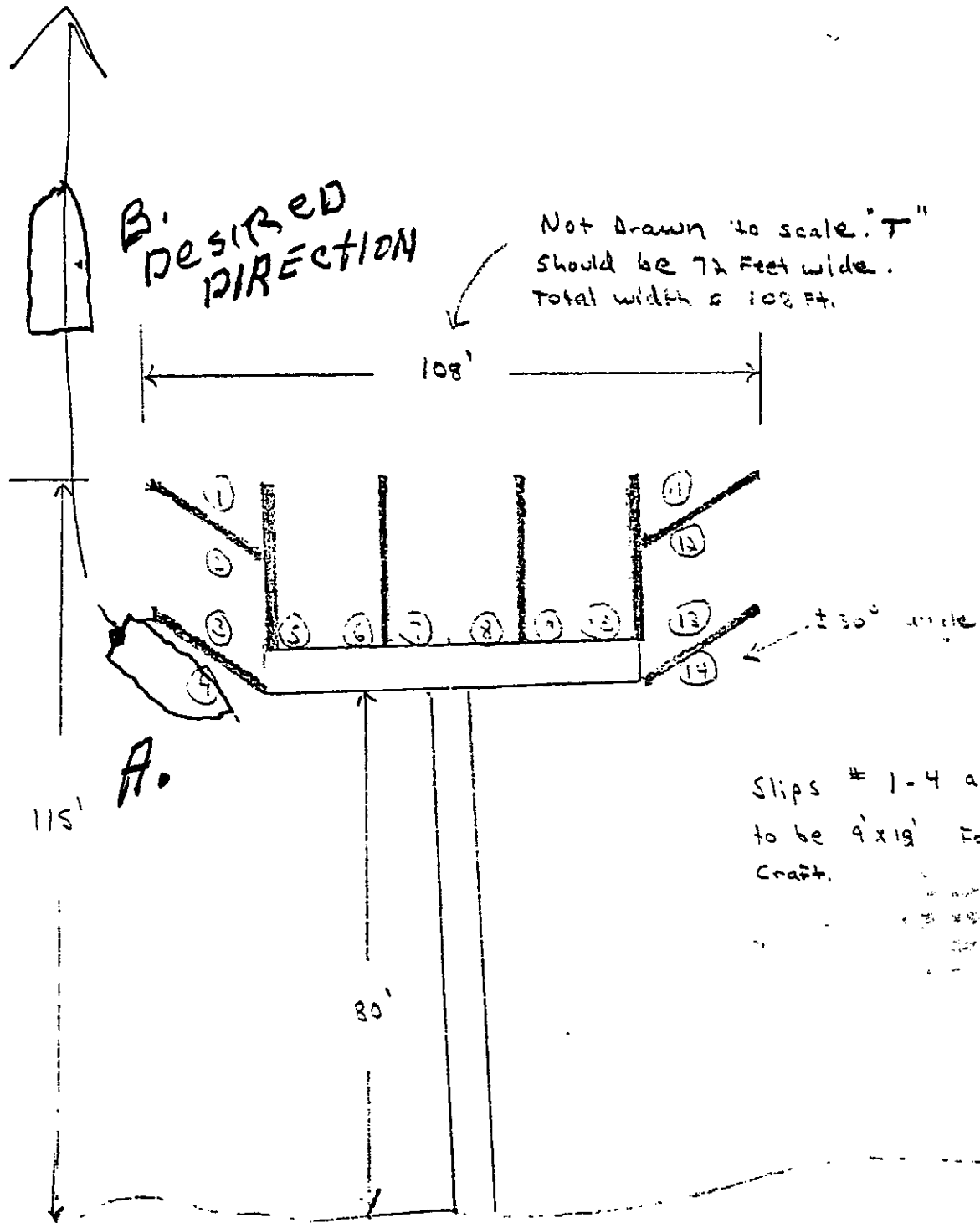
This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on May 23, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By: 

JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE



Slips # 1-4 and 11-14
to be 9' x 19' For smaller
craft.

Scale 1 cm = 10'

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.